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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JOHN VINCENT,
Petitioner,

vs.

DELTA AIRLINES, INC., et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION FIVE

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether California Labor Code § 4644(g) violates the Equal Protection Clause of the Fourteenth Amendment because it unconstitutionally penalizes petitioner for exercising his right to interstate travel.

2. Whether California Labor Code § 4644(g) violates the Privileges and Immunities Clause of the Fourteenth Amendment by discriminating against citizens equally eligible for vocational rehabilitation services simply because they exercised their right to interstate travel.

LISTING OF PARTIES

The parties to the proceedings below were petitioner John Vincent, and respondents Delta Airlines, Inc., Employers Insurance of Wausau, ESIS Inc./CIGNA Property and Casualty Company, and the Workers' Compensation Appeals Board by operation of California law, but the Workers' Compensation Appeals Board did not enter an appearance.

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PETITION FOR WRIT OF CERTIORARI

Petitioner herein, *John Vincent*, respectfully petitions for a writ of certiorari to review the order of the Court of Appeal of the State of California.

OPINIONS BELOW

The order of the California Supreme Court denying petition for review is attached herein as Appendix A.

The order of the California Court of Appeal, Second Appellate District, Division Five, denying petition for writ of review is attached herein as Appendix B.

The opinion and order of the California Workers' Compensation Appeals Board is attached herein as Appendix C. The opinion and order is unreported.

JURISDICTION

The opinion of the California Court of Appeal, Second Appellate District, Division Five, was entered on March 30, 1999. Petitioner timely filed a petition for review to the Supreme Court of California. On May 26, 1999, the Court denied the petition. The United States Supreme Court has jurisdiction to review the intermediate court's decision when the highest court denies discretionary review. *Bandini Petroleum Co. v. Super. Ct.*, 284 U.S. 8, 14 (1931).

This petition has been timely filed within ninety days of the denial for petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law process, nor deny to any person within its jurisdiction the equal protection of the laws.

California Labor Code § 4644(g):

> An employer shall not be liable to provide vocational rehabilitation services at a location outside the state, unless upon agreement of the employer and the employee, or a determination by the Division of the Workers Compensation that those services are more cost-effective than similar services provided in the state.

California Labor Code § 4642(a):

> If the employer fails to assign a qualified rehabilitation representative or to commence

CONSTITUTIONAL AND STATUTORY PROVISIONS - Continued

vocational rehabilitation service in a timely manner as required by Section 4637, or otherwise causes any delay in the provision of vocational rehabilitation services, the full maintenance allowance shall be paid in its entirety by the employer, including the amount payable under paragraph (2) of subdivision (d) of Section 139.5, for the period of the delay. The maintenance allowance and any costs attributable to the delay shall not be subject to the overall cap on vocational rehabilitation services provided by Section 139.5.

California Labor Code § 4635.1(a):

The Legislature finds and declares that vocational rehabilitation provides an important tool for the retraining of injured workers. However, it is equally important that this retraining should be provided in an efficient and cost-effective manner.

California Labor Code § 139.5(c)

When an employee is determined to be medically eligible and chooses to participate

CONSTITUTIONAL AND STATUTORY PROVISIONS - Continued

in a vocational rehabilitation program, he or she shall continue to receive temporary disability indemnity payments only until his or her medical condition becomes permanent and stationary and, thereafter, may receive a maintenance allowance. Rehabilitation maintenance allowance payments shall begin after the employee's medical condition becomes permanent and stationary, upon a request of vocational rehabilitation services. The employee also shall receive additional living expenses necessitated by the vocational rehabilitation services, together with all reasonable and necessary vocational training, at the expense of the employer, but in no event shall the expenses, counseling fees, training, and maintenance allowance and costs associated with, or arising out of vocational rehabilitation services incurred after the employee's request for vocational rehabilitation services, except temporary disability payments, exceed 16,000 thousand dollars ($16,000).

STATEMENT OF THE CASE

Petitioner was employed by *Delta Airlines*[•] as a customer-service representative for thirteen years. Petitioner first began working for respondent on July 16, 1981. Petitioner sustained admitted work injuries during the periods October 23, 1988, through October 23, 1989, and July 11, 1990, through January 16, 1995, to his left knee, back, left elbow, both wrists, and both upper extremities. In January 1995, petitioner terminated his employment with *Delta Airlines* because of his injuries.

In August 1995, petitioner moved to Arizona so that he could live with his family while he self-procured his vocational rehabilitation ["VR"] by continuing his education. On July 2, 1996, petitioner requested VR services. On September 4, 1996, the Rehabilitation Unit ["RU"] issued a determination that petitioner was a qualified injured worker ["QIW"] entitled to VR services.

The purpose of providing rehabilitation services to a QIW is to restore the injured worker to as near his or her previous income-producing status as can reasonably and properly be done. These services typically include prompt and adequate medical treatment, vocational training, counseling, and guidance for the QIW, who will no longer be able to return to his or her former job, in order to prepare and

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At all times mentioned *Delta Airlines* was a corporation duly organized and existing under the laws of the State of California and was insured against all liability arising under California workers' compensation law by *Wausau, Esis Inc./Cigna Property and Casualty Company* -- referred collectively herein as "respondent" or "respondent carrier."

adapt the QIW to a new job or trade and a new work environment. In addition, a QIW is entitled monetary payments during any period he or she is entitled to VR services that serve as additional living expenses necessitated by the rehabilitation program.

Respondent carrier first offered petitioner VR services in the state of California by way of letter dated July 13, 1998. To date, respondent carrier has not provided VR services to petitioner because he moved outside of California. Respondent has refused to provide VR services because of California Labor Code § 4644(g), which prohibits an injured worker from receiving VR services if he or she moves out of state unless the employer agrees or there has been a determination that the VR services are more cost-effective outside of California. Ultimately, petitioner contends that California Labor Code § 4644(g) is unconstitutional because it infringes on his Fourteenth Amendment right to interstate travel; *i.e.*, having moved from California, he lost his VR services. Further, petitioner contends that the State of California has no compelling reason to justify infringing his fundamental right to interstate travel.

PROCEEDINGS BELOW

On February 17, 1999, petitioner filed a Petition for Writ of Review in the Court of Appeal of the State of California . The writ sought review on two issues: 1) whether California Labor Code § 4644(g) extinguished respondent's obligation to provide VR services as required by California

Labor Code §§ 4635 through 4647 and 139.5 because petitioner moved out-of-state; and 2) whether California Labor Code § 4644 is unconstitutional because it infringes on petitioner's Fourteenth Amendment right to interstate travel. Petitioner challenged the constitutionality of California Labor Code § 4644(g) for the first time in his Writ of Review filed with the Court of Appeal of the State of California because the Workers' Compensation Appeals Board, an administrative agency, does not have the power to declare a statute unconstitutional. *Greener v. Workers' Comp. Appeals Bd.*, 6 Cal.4th 1028, 1038 (1993). On March 30, 1999, the Court of Appeal dismissed without prejudice petitioner's writ as premature. On April 8, 1999, petitioner filed a Petition for Review in the Supreme Court of the State of California . On May 26, 1999, the Supreme Court denied petitioner's writ.

SUMMARY OF THE ARGUMENT

The right to interstate travel is inherent in the Constitution. The Court has affirmed this fundamental right in a long line of cases from *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849), to the *Slaughter-House Cases,* 16 Wall. 36 (1873), to *Edwards v. California*, 314 U.S. 160 (1941), to *Shapiro v. Thompson,* 394 U.S. 618 (1969), and most recently *Saenz v. Roe*, 119 S. Ct. 1518 (1999).

California Labor Code § 4644(g) is unconstitutional because it impermissibly interferes with the constitutional right to interstate travel, hence violates both the Equal Protection and the Privileges and Immunities Clauses of the

Fourteenth Amendment.

Essentially, an injured worker loses his or her right to VR services simply by moving out of state, and will receive VR services only if the employer agrees or if there is a determination that out-of-state VR services are more cost-effective. Therefore, under the leading Supreme Court cases, California Labor Code § 4644(g) constitutes an impermissible penalty under the Equal Protection Clause.

Additionally, the Privileges and Immunities Clause is violated because California Labor Code § 4644(g) treats one class of citizens -- those who remain in-state to receive VR services -- more favorably than those who have to leave the state, by denying VR services to the latter simply because they left California. Injured employees who remain in-state are not subject to employer approval or a determination of cost-effectiveness.

The Constitutional test of strict scrutiny should be applied because the statute at issue infringes on an individual's fundamental right to interstate travel.

Petitioner argues that California Labor Code § 4644(g) is not necessary to maintain a compelling state interest for two main reasons. First, the California Legislature has established the maximum VR cost for services, regardless of location, as $16,000. Thus, requiring a finding of cost-effectiveness is repetitive and unnecessary in determining whether out-of-state services are more expensive than in-state, especially in light of the higher costs of living in California. Second, it is unnecessary and illogical

to deny VR services to a QIW who leaves California when all other workers' compensation benefits (medical, temporary/permanent disability, etc.) are not extinguished when the QIW leaves California. Thus, there is no sound fiscal or logical reason for imposing conditions (*e.g.*, employer approval or a determination of cost-effectiveness) upon a QIW's access to VR services.

Therefore, § 4644(g) violates the Fourteenth Amendment because it infringes upon petitioner's right to interstate travel and it is not necessary to achieve a compelling state interest.

ARGUMENT

1. THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED, AS CALIFORNIA LABOR CODE § 4644(g) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE IT UNCONSTITUTIONALLY PENALIZES PETITIONER FOR EXERCISING HIS RIGHT TO INTERSTATE TRAVEL

A. Equal Protection Clause

The United States Supreme Court and the California courts apply one of two tests in determining whether state statutory classifications violate the constitutional guarantees

of equal protection. *Weber v. City Council,* 9 Cal.3d 950, 958 (1973). In cases not involving suspect classifications or the alleged infringement of a fundamental interest, the classification is upheld if it bears a rational relationship to a legitimate state purpose. *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). If the statutory scheme imposes a suspect classification or a classification which infringes on a fundamental interest, such as the right to travel, the classification must be closely scrutinized and may be upheld only if it is necessary for the furtherance of a compelling state interest. *Hansen v. Workers' Comp. Appeals Bd.*, 18 Cal.App.4th 1179, 1183 (1993); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 262 (1974).

In *Maricopa County*, 415 U.S. at 258, the Supreme Court noted that *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), two leading Supreme Court cases involving the Equal Protection Clause and the right to interstate travel, "both stand for the proposition that a classification which operates to penalize those persons who have exercised their constitutional right to interstate migration, must be justified by a compelling state interest." In *Shapiro*, the Supreme Court held that statutory prohibition of welfare benefits to residents of less than a year creates a classification that constitutes an invidious discrimination denying them equal protection of the laws. In addition, the court found denial of welfare benefits to be a penalty because it was a denial of the "very means of subsistence -- food, shelter, and other necessities of life." 394

U.S. at 627.

In *Dunn*, the Supreme Court held a state law invalid that required a voter to be a resident of the state for one year and the county for three months before he could vote. The court found the denial of the right to vote to be a penalty. 405 U.S. at 330. Ultimately, in *Maricopa County*, the Supreme Court found the denial of non-emergency medical care to be a penalty because it is a basic necessity of life. 415 U.S. at 259.

In this case, the penalty imposed is California Labor Code § 4644(g), which denies VR services to a QIW who requests services outside of California, unless the employer agrees or there is a finding of cost-effectiveness. Petitioner requires VR services to be retrained in a new occupation so he can reenter the labor market. Until petitioner can reenter the labor market, he is unable to provide himself with the very means of subsistence -- food, shelter, and other necessities of life. Essentially, a law which prevents injured workers from receiving rehabilitation services may cause these individuals to become dependant on the state for assistance. Thus, if this Court has found the denial of "non-emergency medical care" to be a penalty, the denial of rehabilitation services, which keep a QIW from reentering the labor market, should be seen as a penalty as well.

In addition, other factors illustrate how petitioner is being penalized by California Labor Code § 4644(g). First, California Labor Code § 4644(g) is more burdensome than a residency requirement because it forever bars petitioner from

receiving VR services outside of California without an agreement or a finding of cost-effectiveness. The typical residency requirement penalizes a new resident for only one year. Second, petitioner was employed by *Delta Airlines* in California for more than thirteen years. He is not a "new resident" and more rightfully has earned all of the benefits to which any worker injured in California is entitled. Third, petitioner depends on VR services to be retrained so he can reenter the work force. These services do not become any less important to petitioner merely because he moves out of California.

Petitioner's case is distinguishable because the residency requirement of California Labor Code § 4644(g) requires him to remain a California resident to receive rehabilitation services. Essentially, California Labor Code § 4644(g) is penalizing petitioner for "leaving" California. Typically, the right to travel involves citizens being penalized for "entering" the state as new residents. However, the Supreme Court has held that the right to travel applies to both situations. *Saenz*, 119 S. Ct. 1518 (1999). The one Supreme Court case discussing penalties against an individual for leaving a state is *Jones v. Helms*, 452 U.S. 412 (1981). While the statute was upheld in *Jones*, the Court held that "a simple penalty for leaving a state is simply impermissible." 452 U.S. at 422. Thus, California Labor Code § 4644(g) should be held unconstitutional for infringing on petitioner's right to travel by penalizing and depriving him of VR services outside of California. The next issue is whether California Labor

Code § 4644(g) is necessary to achieve a compelling state interest.

B. Strict Scrutiny

The state interest California has indicated is cost-effectiveness. California Labor Code § 4635.1. However, one may question whether cost-effectiveness is necessary to achieve a compelling state interest when considering that California has one of the highest costs of living in the nation and that the state has predetermined cost-effective parameters under California Labor Code § 139.5(c), which places a $16,000 cap on VR services. California Labor Code § 139.5(c) provides: ". . . in no event shall the expenses, counseling fees, training, maintenance allowance, and costs associated with, or arising out of, vocational rehabilitation services, except temporary disability payments, exceed sixteen thousand dollars." Thus, California's interest is not compelling to justify § 4644(g) infringement on the right to travel because cost-effectiveness is being enforced by the sixteen-thousand-dollar cap on VR services pursuant to § 139.5.

There is no reason for the RU to determine cost-effectiveness. The California Legislature has determined that said benefits shall not exceed $16,000. Thus, cost-effectiveness was pre-determined by the Legislature. As a result, the injured worker, regardless of the state in which benefits are sought, will be limited to $16,000.

In addition, petitioner argues it is unnecessary and

illogical to treat VR services any differently from other workers' compensation benefits which are not forfeited by a worker simply for moving out of state. Generally, there are five different benefits available to a QIW: 1) medical, 2) temporary disability, 3) permanent disability, 4) VR services, and 5) death benefits. All of these workers' compensation benefits are still provided when a QIW moves outside of California -- except for VR services.

In *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.*, 69 Cal.App.3d 884 (1977), which is similar to this case, the injured worker sought out-of-state medical treatment and the court addressed the issue of Constitutional right to interstate travel. The Court, in interpreting California Labor Code §§ 3209.3 and 3209.5, cited five instances in which out-of-state medical treatment would be necessary:

> 1) "an employee, whose **[sic]** within the Appeals Board jurisdiction, is injured outside the state and either resides there or will be there for a lengthy period, and whose employer maintains out-of state operations as part of their **[sic]** California business, is injured out-of-state. For example, a contractor may hire a worker in California for work overseas. The injured employee is either treated in the locale where the accident occurred and, even upon return to the United States, sometimes treated at a medical center outside the state for treatment;

2) "where a worker lives in a part of California which is far from medical facilities and physicians in California but which is close to facilities and physicians in another state. Examples would be the extreme northern part of the state where Oregon facilities and physicians, often specialists, are readily available or in the Lake Tahoe -- eastern part of the state where Reno, Nevada, has outstanding physicians, specialists, and medical facilities;

3) "A third situation exists where a worker is injured in California and then for one reason or another moves to another state to live. Such a move may be dictated by economic reasons, more favorable employment opportunity in the face of a serious injury, a desire to be closer to family and friends, where there is an inability to work, or for any number of reasons." (*citing Vanderwerth v. Whiting & Mead* 16 I.A.C. 32 (1929);

4) "A fourth situation exists where the worker in California and **[sic]** returns to his native state or country for treatment from competent treating physician. This decision may be dictated because of language considerations or simply a matter of faith in a physician who is of the same background as the injured worker

> himself. A good example would be a Mexican worker who returns to Mexico and comes under the care of a competent treating physician." (citation)
>
> 5) "A fifth situation exists where the worker leaves California temporarily for one reason or another and requires emergency treatment outside of the state." *Id.* at 889-890.

These five situations are also applicable to VR services. Indeed, the third situation is applicable to the instant case. Petitioner, after his employer failed to authorize VR pursuant to statute, self-procured VR services by enrolling at Arizona State University; he lived with his family as he had no other source of earnings. Petitioner earned a baccalaureate degree in finance. Respondent did not provide petitioner with the VR services to which he was entitled -- the rationale being his having left California. Petitioner was burdened economically as a result.

In addition, the second situation clearly illustrates how illogical California Labor Code § 4644(g) is. Consider an injured worker who lives on the border of California and Nevada but resides in Lake Tahoe on the Nevada side of the border. That worker can receive medical care across the street in California, he can receive temporary-disability benefits from the post office box across the street in California, but he cannot receive VR services in California because he is a resident of Lake Tahoe, Nevada. Said disparity between the classes of benefits in this example is illogical. This is a

glaring illustration of how California Labor Code § 4644(g) penalizes an individual for exercising his right to travel between Nevada and California.

Thus, California Labor Code § 4644(g) should be held unconstitutional, as there is no compelling interest to justify infringing on the right to travel protected by the Fourteenth Amendment.

C. Public Policy Considerations

Essentially, California Labor Code § 4644(g) frees an employer of liability for VR services outside the state unless the employer agrees to the services or there has been a determination that the out-of-state services are more cost-effective.

If respondent carrier does not agree to VR services outside the state and a determination is not made that VR services out of state are more cost-effective, then petitioner will barred from the VR services to which he is statutorily entitled as a consequence of exercising his constitutional right to interstate travel. California Labor Code § 4644(g) forces a worker to remain in-state if the employer, for whatever reason, unilaterally decides not provide out-of-state benefits. This petition should be granted so that petitioner can receive his entitled services unconditionally, as do QIWs who remain in-state. California Labor Code § 4644(g) imposes a condition for VR services which is impermissibly unconstitutional.

An important issue to consider is the economic

deprivation that petitioner and others similarly situated will suffer if VR services are extinguished upon QIWs' moving out-of-state. California has one of the highest cost-of-living standards in the nation. As a result, many injured workers are forced to move due to financial considerations. Because of a work-related injury which prohibits the return to their usual and customary occupations, these injured workers, who are no longer employed, have to rely on family, friends, or find less expensive living arrangements until either VR is completed or they find alternate employment. This is petitioner's situation -- he moved to Arizona to live with his family because of financial considerations. If out-of-state VR services are refused, then the standard of living for many injured workers is undeniably negatively affected -- and, in certain instances, the state's treasury is negatively affected as well, *i.e.*, more welfare recipients.

Finally, if a QIW has moved out-of-state and the RU has subsequently determined that services are less expensive in-state, then said decision will cause a financial burden and strain on the QIW who will be forced to return to California just to receive his entitled benefits. Thus, a QIW fearing a loss of benefits cannot leave the state -- this is an unconstitutional burden on interstate travel.

The constitutional issues need to be adjudicated so that petitioner can receive his entitled VR services. Unless a ruling on these issues is forthcoming, petitioner will indefinitely be held in limbo and at the mercy of his employer for no justifiable reason.

In addition, petitioner is not the only individual affected by California Labor Code § 4644(g). Other injured workers have lost VR services and will continue to lose them simply because they chose to move outside of California.

2. CALIFORNIA LABOR CODE § 4644(g) VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT BY DISCRIMINATING AGAINST CITIZENS EQUALLY ELIGIBLE FOR VOCATIONAL REHABILITATION SERVICES SIMPLY BECAUSE THEY EXERCISED THEIR RIGHT TO INTERSTATE TRAVEL

Section 1 of the Fourteenth Amendment expressly states that no law shall abridge the privileges and immunities of citizens. Inherent within this clause is the right to interstate travel.

"The right to move freely from State to State is an incident of national citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference." *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring.) Justice Douglas, quoting Justice Moody, noted,

> "privileges and immunities of citizens of the United States are only such that arise out of the nature and essential character of the national government, or are specifically

> granted or secured to all citizens or persons by the Constitution of the United States."
> *Twining v. State of New Jersey*, 211 U.S. 78, 97 (1908).

Justice Moody went on to say that one of those rights of national citizenship was "the right to pass freely from state to state." 211 U.S. at 97.

In *Saenz*, the court struck down as unconstitutional a California statute designed to limit the amount of welfare benefits to new residents to the amount provided by the state from which they departed because it violated the Privileges and Immunities Clause. This type of discriminatory classification was found to be a penalty. 119 S. Ct. at 1527.

Further, the court rejected California's fiscal justification for enacting the statute. The court held that the "State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." 119 S. Ct. at 1528.

The Court stated that even an "incidental" impairment on the right to travel is not permissible. 119 S. Ct. at 1527. In *Saenz*, the Court posited that the right to interstate travel is "assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all." 119 S. Ct. at 1524 (*citing U.S. v. Guest*, 383 U.S. 745 (1966)).

California Labor Code § 4644(g) impermissibly violates the Privileges and Immunities Clause by discriminating against citizens entitled to VR services who

chose to move out of state. An in-state QIW's right to VR services is impaired in no way. If a QIW exercises his Constitutional right to travel freely, his right to VR services is not guaranteed -- given the existence of California Labor Code § 4644(g). A QIW has the constitutional right to travel freely from state to state, free from California's interference. California Labor Code § 4644(g) interferes with petitioner's constitutional right to travel freely because he is not entitled to VR services outside of California unless by agreement or a finding by the court they are more cost-effective out-of-state. Essentially, § 4644(g) penalizes a QIW for leaving California and seeking VR services in another state.

The state has no compelling interest to justify discriminating among equally eligible citizens. As discussed earlier, a finding of cost-effectiveness is not necessary because of the $16,000 cap. In addition, no other workers' compensation benefits are forfeited by an injured worker who moves out-of-state; therefore it is unnecessary and illogical to treat VR services any differently. Logically, once a person is entitled to VR services, those services should not be forfeited simply because of his relocating.

The effect of California Labor Code § 4644(g) is in complete contradiction to the recognition

> [T]hat the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or

regulations which unreasonably burden or restrict this movement. *Shapiro, supra*, 394 U.S. at 629.

Thus, California Labor Code § 4644(g) should be held unconstitutional under the Privileges and Immunities Clause, as it deters interstate travel by discrimination against only those citizens who exercise their basic constitutional right to leave the State of California.

CONCLUSION

The petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner
John Vincent

APPENDIX A

APPENDIX A

Second Appellate District, Division Five, No. B129494
S078026
IN THE SUPREME COURT OF CALIFORNIA

SUPREME COURT
FILED
May 26, 1999
Robert Wandruff Clerk

Deputy

JOHN VINCENT, Petitioner

v.

WORKERS' COMPENSATION APPEALS BOARD, Respondent

DELTA AIRLINES INCORPORATED, Respondent

Petition for Review DENIED.

GEORGE

Chief Justice

APPENDIX B

APPENDIX B

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

COURT OF APPEAL- SECOND DIST.
FILED March 30, 1999
JOSEPH A. LANE Clerk
Z. HERALDEZ Deputy Clerk

JOHN VINCENT,	)	
Petitioner	)	B129494
v.	)	(W.C.A.B. Nos. VNO
WORKERS' COMPEN-	)	0299136; VNO 0299138)
SATION APPEALS BOARD,	)	
DELTA AIRLINES, INC.,	)	ORDER
et al.,	)	
Respondents	)	

The petition for writ of review filed herein is dismissed without prejudice as premature. (Lab. Code, § 5950; *Gumilla v. Industrial Acc. Com.* (1921) 187 Cal. 638; *Minton v. Workers' Compensation Appeals Bd.* (1975) 40 Cal.Comp.Cases 313 (writ den.).)

TURNER, P.J. GRIGNON, J. ARMSTRONG, J.

APPENDIX C

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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOHN VINCENT,	)	Case No. VNO 0299136;
	)	VNO 0299138
Applicant	)	
	)	OPINION AND ORDER
vs.	)	GRANTING
	)	RECONSIDERATION
DELTA AIRLINES, INC.,	)	AND DECISION AFTER
	)	RECONSIDERATION
Defendant(s).	)	
	)	

(Filed January 4, 1999)

Defendant, Delta Air Lines, Inc., seeks reconsideration of the Findings and Award of October 15, 1998, wherein it was found that defendant is liable for payment of vocational rehabilitation maintenance allowance (VRMA) from July 2, 1996 through March 20, 1998, and that the issue of further liability is off calendar with jurisdiction reserved; that defendant is liable for the payment of VRMA at applicant's temporary disability indemnity rate; that defendant is liable for one 10% Labor Code section 5814 penalty based on the entire VRMA benefit; and that attorney's fees of 15% are awarded, pursuant to the opinion on decision.

In his opinion on decision, the workers, compensation administrative law judge (WCJ) states:

> "Defendant contested applicant's Q.I.W. status and provided no notification of rights or Vocational Rehabilitation (V.R.) benefits.

> Labor Code § 4644(g) does not relieve defendant of its obligations in these regards. Defendant admits to receiving the report of Dr. Angerman along with applicant's benefit demand letter dated 7/2/96. By way of the 3/20/98 Findings and Award, applicant was found to be a Q.I.W. Defendant did not appeal this finding. Based on all of the above, defendant is held liable for V.R.M.A. benefits starting on 7/2/96 *(Webb vs. WCAB* 45 CCC 1282, *San Diego Transit Corp. vs. WCAB (Renfro)* 45 CCC 1292, *Industrial Indemnity vs, WCAB (Elizondo)* 50 CCC 171, *Baxter vs, WCAB* 60 CCC 690)."
>
> "As such, and for all of the reasons previously indicated, the WCJ finds that defendant is liable for the provision of V.R.M.A. benefits starting on 7/2/96 and continuing through 3/20/98 (the date of service of the first Findings and Award). According to the majority panel, it then became applicant's responsibility to demand an out of state V.R. program."
>
> "Whether defendant is liable for benefits after 3/20/98 is dependent on the outcome of the Labor Code §4644(g) issue."

Regarding the Labor Code section 4644(g) issue, the WCJ found that pursuant to Labor Code section 4645(c) and in the interest of fully developing the record, as required by the remand from the Appeals Board, the issue is remanded to the Rehabilitation Unit. The WCJ directed the Rehabilitation Unit to consult and review the majority panel decision. (See, Decision After Reconsideration, dated June 19, 1998.)

Defendant contends that 1) applicant in this case

moved out of state and moved to Arizona prior to a medical determination that he was a qualified injured worker (QIW), according to the medical opinion of Dr. Angerman; 2) applicant and applicant's attorney did not follow proper procedures under Labor Code section 4644(g) because they did not request services to be provided to an out-of-state applicant; 3) in August of 1998 applicant further complicated the situation by moving from Arizona to Missouri; 4) a 10% penalty is not warranted because applicant was out-of-state when the decision was made that he was a QIW, therefore, defendant had a legitimate good faith belief that applicant was not entitled to rehabilitation services under Labor Code § 4644(g); 5) the Rehabilitation Unit has never made the determination that services are more cost effective out-of-state than services provided in California; 6) the WCJ should have taken evidence on whether or not services in Arizona could provide a feasible alternative and the WCJ did not take evidence on that issue; 7) the case should be referred to the Rehabilitation Unit, in accordance with Labor Code section 4644(g), and 8) the award of a 10% penalty should be rescinded because there was a genuine good faith issue as to whether or not applicant was entitled to any type of benefit.

Based on our review of the record, and for the reasons stated herein, we will grant reconsideration and rescind the Findings and Award. We will specifically issue an order referring this case to the Rehabilitation Unit for resolution of the Labor Code section 4644(g) issue.

With respect to the Labor Code section 4644(g) issue,

we are persuaded that the Rehabilitation Unit has the initial jurisdiction to resolve any dispute. In this case Dr. Alexander Angerman, agreed medical examiner (AME), examined applicant on February 1, 1996 for his injury of October 23, 1989. Under "employment history" Dr. Angerman states that applicant quit his job with Delta Air Lines on January 16, 1995, because of the numerous injuries, his pain and because he was returning to college. The applicant informed Dr. Angerman that he enrolled in El Camino College full-time in the spring of 1995. He informed Dr. Angerman that in August of 1995 he relocated to Arizona and enrolled in Glendale Community College, taking courses in physical therapy. Dr. Angerman states that applicant remained in school at the time of his report and was not receiving any benefits. Dr. Angerman further reviewed the deposition of applicant, taken May 10, 1995, in which applicant stated he was moving to Phoenix in two weeks because he was going to school there at Glendale Community College.

Thus, as defendant contends, applicant had moved to Arizona prior to the February 1, 1996 report when the AME opined that applicant was a qualified injured worker. Therefore, the WCJ's determination that defendant is liable for payment of vocational rehabilitation maintenance allowance from July 2, 1996 through March 20, 1998, covers the period of time after which applicant had moved out-of-state.

Labor Code section 4644(g) provides:

"An employer shall not be liable to provide vocational rehabilitation services at a location

outside the state, unless upon agreement of the employer and the employee, or a determination by the Division of Workers' Compensation that those services are more cost-effective than similar services provided in the state." (Emphasis added.)

Pursuant to Labor Code section 4644(g), we are persuaded that the entire period of VRMA should first be deter mined by the Rehabilitation Unit and not merely that portion after March 20, 1998.

Moreover, we are persuaded that under the facts of this case defendant had a reasonable doubt with regard to its liability to provide vocational rehabilitation services, and therefore, no Labor Code section 5814 penalty is warranted.[1]

On this basis, we will rescind the WCJs decision and issue an order that on remand referral shall be made to the Rehabilitation Unit to resolve the Labor Code section 4644(g) issue.

For the foregoing reasons,

IT IS ORDERED that defendants Petition for

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1 Labor Code section 5814 states in relevant part, "When payment of compensation has been unreasonably delayed or refused, either prior to or subsequent to the issuance of an award, the full amount of the order, decision or award shall be increased by 10 percent. The question of delay and the reasonableness of the cause therefor shall be determined by the appeals board in accordance with the facts." Unreasonable delay or refusal occurs when there is no genuine doubt benefits are owed, from a medical or legal standpoint. (Kerley v. Workmen's Comp. App. Bd. (1971) 4 Cal.3d 223, and Gallamore v. Workers' Comp. Appeals Bd.

Reconsideration filed November 5, 1998, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED as the Appeals Board's decision after reconsideration that the Findings and Award of October 15, 1998, be, and the same hereby is, **RESCINDED** and the case **RETURNED** to the trial level for referral to the Rehabilitation Unit to initially resolve the Labor Code section 4644(g) issue.

WORKERS' COMPENSATION APPEALS BOARD

/s/

I CONCUR,
/s/ J. Weigand

I DISSENT, (See attached dissenting opinion.)
/s/ Colleen S. Casey

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
JANUARY 4, 1999
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.
bmp /s/

DISSENTING OPINION

I dissent. I would affirm the workers' compensation administrative law judge's (WCJ) decision for the reasons stated in his Report and Recommendation of November 9, 1998. The WCJ notes the procedural history in his report. He indicated that a Determination of the Rehabilitation Unit issued finding that applicant was a Qualified Injured Worker entitled to vocational rehabilitation benefits. The Determination was based on the opinion of the Agreed Medical Examiner, Dr. Angerman.

Defendant appealed contending that Dr. Angerman "did not understand the issue" and that his report did "not support a Finding of a Qualified Injured Worker."

A trial was held on defendant's appeal and an additional issue was raised for the first time by defendant pursuant to Labor Code section 4644(g). The WCJ denied the appeal and found that Labor Code section 4644(g) did not insulate defendant from liability. The WCJ found applicant to be a Qualified Injured Worker (Q.I.W.).

Defendant sought reconsideration but did not contest the finding that applicant is a Q.I.W.. The majority panel granted defendant's petition ordering that the record regarding the Labor Code section 4664(g) issue be further developed and stating that it is "applicant's responsibility to raise the issue of desiring rehabilitation outside of the state of California . . ."

Subsequently, a trial hearing took place. A Findings and Award issued on 10/15/98 at which time defendant

was held liable for the payment of V.R.M.A. at applicant's temporary disability rate pursuant to Labor Code section 4642 and Labor Code section 4637. Also, defendant was found liable for one Labor Code section 5814 penalty (it is noted that the Labor Code section 5814 section of the opinion on Decision was inadvertently excluded, but will be covered in this report). Also, the Labor Code section 4644(g) issue was remanded to the Rehabilitation Unit to assist with development of the record. Defendant filed a timely Petition for Reconsideration raising for the first time the issue of whether "a carrier who last provided coverage in 1992 should be held liable for rehabilitation when the applicant retired in 1995, whether applicant could be considered feasible for rehabilitation when he moved out of state and did not pursue rehabilitation when tendered, and whether a Labor Code section 5814 penalty was proper."

On the merits of the V.R.M.A. and Labor Code section 4644(g) issue the WCJ states in his report:

> "Firstly, it should be noted that the issue of whether applicant qualifies for vocational rehabilitation pursuant to Labor Code section 4644(g) was remanded to the Rehabilitation Unit to assist with development of the record. Accordingly, and pursuant to the decision of the majority panel, no decision in this regard has yet been made. No Petition for Reconsideration may be taken on this issue as no final decision has been made."

"Secondly, the defendant neglected to clarify that the first time applicant was offered vocational rehabilitation in the state of California was by way of a letter directed to applicant dated 7/13/98. In this regard, note the reflection on page two (2) of the minutes of the 9/29/98 hearing."

"The issue of liability for retroactive benefits was addressed in the Findings and Award. V.R.M.A. was awarded beginning on 7/2/96, after applicant was identified as being a Q.I.W. by Dr. Angerman, A.M.E., and as of applicant's vocational rehabilitation demand letter dated 7/2/96. On 9/4/96, the Rehabilitation Unit issued a decision that the applicant was a Q.I.W. Defendant appealed that decision. It was not until the Findings and Award dated 3/20/98, that the issue of applicant's Q.I.W. status was decided. Defendant continued to contest applicant's status as a Q.I.W. until then. Defendant did not appeal the decision of the Rehabilitation Unit on the basis of Labor Code § 4644(g) and did not raise the issue until the 3/11/98 trial hearing. Pursuant to applicant's unrebutted testimony, defendant has provided no vocational rehabilitation benefits and has provided no vocational rehabilitation notices. Defendant offered no vocational rehabili-

tation program in the state of California until it did so by way of its letter dated 7/13/98."

"There is no provision in Labor Code § 4644(g) relieving defendant of the obligation to provide notices. There is no provision relieving defendant of the need to provide benefits while applicant's status as a Q.I.W. is being investigated. Also, there is no provision relieving defendant of the obligation to offer a vocational rehabilitation program in California after it is settled that applicant is a Q.I.W.. (*Webb vs. WCAB* 45 CCC 1282, *San Diego Transit Corp. vs. WCAB (Renfro)* 45 CCC 1292, *Industrial Indemnity vs. WCAB (Elizondo)* 50 CCC 171, *Baxter vs, WCAB* 60 CCC 690)."

"The fact that an applicant moves out of state does not trigger Labor Code § 4644(g). This section only comes in to play when applicant demands services out of state. In this case, applicant testified that he would have accepted vocational rehabilitation services in California had services been timely offered. No services were offered because defendant was contesting applicant's status as a Q.I.W.. The panel majority directed that applicant has the responsibility of demanding out of state services before Labor Code § 4644(g) is triggered. Applicant had no reason to demand services out of state

until his Q.I.W. status had been decided (3/20/98 Findings and Award)."

"It is apparent that defendant was not prepared to offer services either in California or any other state until that issue was decided. In fact, defendant was doing nothing to satisfy its vocational rehabilitation liability. As previously indicated, it was not until the letter of 7/13/98, that defendant finally gave applicant the option of accepting a vocational rehabilitation program in the state of California."

"Accordingly, retroactive V.R.M.A. benefits were awarded retroactive to 7/2/96, the date of demand, through 3/20/98, the date that applicant status as a Q.I.W. was decided. Using the majority panel's reasoning, the applicant then became obligated to demand out of state services which triggered the need to explore the Labor Code § 4644(g) issue."

Next, with regard to penalty, he states:

"Defendant was held liable for one 10% penalty pursuant to Labor Code §5814 for the failure to pay V.R.M.A. while applicant's status as a Q.I.W. was being contested and investigated (*San Diego Transit vs. WCAB (Renfro)* 45 CCC 1292, *Chavez vs. Golden Eagle* 26 CWCR 46). As previously noted, defendant was providing no benefits during this period when it is clear

under the law that it was obligated to do so (Labor Code 139.5(d) (2)). This report cures any Labor Code § 5313 deficiency (*Smales vs. WCAB* 45 CCC 1026)."

"Much the same reasoning was used to decide that defendant was liable to pay V.R.M.A. at applicant's temporary disability rate pursuant to Labor Code § 4642 and 4637. Despite the receipt of Dr. Angerman's report (A.M.E.), which contained the information that applicant is a Q.I.W., and despite applicant's demand for the provision of benefits, no notices, services, or benefits were offered or provided. This has resulted in a significant delay from the date of demand on 7/2/96 until defendant's first offer of services on 7/13/98."

In addition, I note that the applicant testified at the hearing of September 29, 1998, as follows:

"Applicant recalled testifying at the trial on March 11, 1998. He began studying for his bachelor's degree at Arizona State University in September 1996."

"It was more economical for him to live in Arizona because he had family that he could live with. His tuition cost at Arizona State University was between $900 to $1,000 per semester. The fees at the state colleges in California were comparable to this.

"As of July 26, 1996, he had received no notification from Defendant as to his right to pursue vocational rehabilitation. He has not received any notification from them to date."
"Had he been offered vocational rehabilitation in California in June 1996. which is before he started at Arizona State University, he would have accepted vocational rehabilitation benefits." (Emphasis added.)
On this basis, I would affirm the WCJ's decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Colleen S. Casey

COLLEEN S. CASEY, COMMISSIONER

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
JANUARY 4, 1999
SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.
bmp /s/